75-1228

IN THE

Supreme Court of the United States

LILLIE BELLE HAIRSTON,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Lillie Belle Hairston, petitions for a writ of certiorari to review a judgment of the Supreme Court of Virginia as follows:

1. REFERENCE TO REPORTS OF OPINIONS

An opinion was delivered by the Supreme Court of Virginia on December 1, 1975 and is appended to this petition. The opinion will appear in Volume 216 of the official Virginia Reports and will also appear in the Southwestern Reports published by West Publishing Company; but at the date of drafting this petition, the precise reporter books and page numbers are unknown.

II. STATEMENT OF GROUNDS TO INVOKE JURISDICTION

Jurisdiction is invoked on the grounds that the Petitioner was convicted of possession of a controlled substance based on evidence of such substance obtained by an illegal search and seizure of the Petitioner's pocketbook in violation of Section 1 of Amendment XIV of the Constitution of the United States of America; and

1. The judgment sought to be reviewed was made and entered by the Supreme Court of Virginia on December 1, 1975 affirming a judgment of the Circuit Court of the City of Roanoke on October 16, 1974 convicting the Petitioner of a misdemeanor of illegal possession of a controlled substance on June 6, 1974 in violation of Va. Code § 54-524.101 : 2(b) ; and

2. An order of the Supreme Court of Virginia was entered on December 20, 1975 staying its judgment on December 1, 1975 affirming the conviction as aforesaid in order to permit the Petitioner to have reasonable time and opportunity to apply to this Court for a petition for a writ of certiorari to review the aforesaid judgment of that court. The stay is effective until February 29, 1976; and, if by that time the case has been docketed in this Court, thereafter until final determination by this Court. There has been no application for a rehearing to the Supreme Court of Virginia; but its judgment on December 1, 1975 consisted of a final adjudication by the highest court of the Commonwealth of Virginia concerning the subject matter in controversy; and

3. The statutory provision believed to confer jurisdiction on this Court to review the final judgment in question by a writ of certiorari is 28 U. S. C. § 1257(3).

III. QUESTIONS PRESENTED

The sole question presented for review by this petition for a writ of certiorari is whether the controlled substance is admissible as evidence in a state criminal trial charging illegal possession of same when the controlled substance was found by a police officer when searching the wallet of the accused, without probable cause, for the purpose of determining the identity of the accused when the accused was not under arrest or engaged in a suspicious activity.

IV. CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision which this case involves in the second sentence of Amendment XIV, Section 1, of the Constitution of the United States and is as follows:

> "No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

By judicial decision, the aforesaid due process clause of the Fourteenth Amendment makes Amendment IV of the Constitution of the United States of America applicable to the State criminal proceedings, which is as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized."

V. STATEMENT OF THE CASE

The following is a concise statement of the case confined to the question presented. Page references to the record prepared by the clerk of the trial court are preceded by the letter "R" and to the transcript of the testimony and incidents of the trial by the letter "T". The Petitioner is referred to as "Hairston" and the Respondent as "Virginia". The appendix containing important parts of the record and transcript is not included in this record of the trial court; but because the record was returned to the trial court after the judgment of the Supreme Court of Virginia on December 1, 1975 and before the order of stay on December 20, 1975, the clerk of the trial court is the court possessed of the record.

This case involves a rather flagrant incident of the police raiding a massage parlor without a search warrant and searching a citizen's wallet for identification without legal authority for the search. The trial de novo was before the trial judge without a jury on October 16, 1974. At a pretrial discussion immediately before the trial, Hairston announced her sole defense was the controlled substance was found by a police officer in her wallet as a result of an illegal search and moved the evidence of the controlled substance be supressed; but the trial court took the motion under advisement until hearing all the evidence. At the conclusion of the trial, the trial court decided the controlled substance was not obtained by an unreasonable search and consequently admissible evidence and further found Hairston guilty, fixing punishment by a fine of $150.00 and by confinement in jail for thirty days suspended on good behavior. A formal judgment was entered on the same day of October

16, 1974 and recites the pertinent incidents heretofore mentioned in this paragraph (R. 7-8). By appropriate proceedings, this judgment was reviewed by the Supreme Court of Virginia who affirmed the judgment of conviction by decision on December 1, 1975 attached as an appendix to this petition for writ of certiorari.

The facts are that on June 6, 1974, Mr. F. S. Cruser, a policeman employed by the City of Roanoke Department of Police, accompanied several other police officers to Miss Rene's Massage Parlor at 2211 Williamson Road, Northwest, in the City of Roanoke, Virginia (T. 3). The purpose of the officers' visit to the massage parlor was to execute an arrest warrant on Mr. L. R. Brown, Jr., the proprietor of the massage parlor (T. 3; T. 7; T. 8). While the police officers supposedly had information juveniles were working in the establishment (T. 7), they did not obtain a search warrant based on this information even though they had time and opportunity to do so (T. 8). A policeman assigned to the Vice Squad had the warrant for the arrest of Mr. Brown (T. 9). He was accompanied by several other members of the Vice Squad including Mr. Cruser (T. 9). In addition there were several members of the Youth Squad (T. 9). Also there were one or two uniformed police officers in the group (T. 9). The announced reason for all of these police officers accompanying the police officer executing the warrant was to assist in case there was difficulty making the arrest (T. 9); but most of these "back-up" men were not uniformed police officers (T. 9). Mr. Cruser was the last police officer to enter the building (T. 3) and Mr. Brown was already under arrest when Mr. Cruser entered the building (T. 10). The only other person in the building at the time of the raid by the po-

lice officers was Hairston (T. 29). When Mr. Cruser entered the building, he not only observed Mr. Brown was under arrest and the arresting officer needed no assistance (T. 23), but he also observed another police officer talking to Hairston (T. 3; T. 10). Mr. Cruser walked through the front room where Mr. Brown and Hairston were towards the rear of the building (T. 14) although he did not have a search warrant to intrude in this private area of the building (T. 14). After going partially to the rear of the building, Mr. Cruser turned around and returned to the front room where other police officers were already talking to Hairston (T. 16). At this point, Mr. Cruser went to Hairston and asked for her identification (T. 17; second answer), but he did not ask her age (T. 17; seventh answer). Specifically Mr. Cruser testified *"I said, we needed some sort of positive identification"* (T. 17; last answer).

According to Mr. Cruser, his purpose in seeking identification from Hairston was to determine if she were a juvenile. According to Mr. Cruser, Hairston was born on October 10, 1948 and was twenty-five years old at the time of his demand for her identification and twenty-six years at the time of the trial (T. 6). According to Mr. Cruser, another officer had already asked Hairston for identification and she was unable to produce it. (T. 23-24). Then Mr. Cruser insisted that he had to have identification as to who she was and how old she was (T. 18; T. 24). At this point, there is a variance between the testimony of Mr. Cruser and the testimony of Hairston.

According to Mr. Cruser, Hairston began looking through her pocketbook and became perturbed. She opened up her pocketbook, dumped the contents on the sofa

in the office area and told Mr. Cruser "I can't find it, you look for it" (T. 4). One of the objects from her pocketbook on the sofa was her wallet. Mr. Cruser began looking through the wallet for identification and found the four tablets of phenobarbital in the change compartment of the wallet (Exhibit 1; T. 24).

According to Hairston, when the police officers came into the massage parlor and arrested Mr. Brown, they approached her and said "You're under arrest, too; come on and go with us"; but they did not take her to the police station after they went through her purse from which $100.00 was later found missing (T. 28). The police officers searched every room in the building including the bathroom (T. 29). Three plain clothes officers pushed her back into the corner when Mr. Cruser took her pocketbook from the top of a television and, without her permission, poured the contents on the sofa and began looking through her wallet (T. 28; T. 30).

Mr. Cruser did not contradict Hairston's testimony that the police searched the whole building but limited his testimony to saying that he could only state what he did as the last policeman to enter the building (T. 15; second answer). Finally Mr. Cruser did not know if any other policeman had told Hairston she was under arrest (T. 22; last answer). Also Mr. Cruser could not state what criminal offense he was investigating by reason of a minor being in a massage parlor (T. 11-12).

While the opinion of the Supreme Court of Virginia holds Hairston consented to the search, the trial judge made no factual ruling concerning consent. Instead, the trial judge ruled:

"I don't really see this as a pure search and seizure problem, Mr. Kennett. According to the testimony of the officer, he was in the place of business, Mr. Brown's place of business, the massage parlor, and had a lawful warrant to arrest Mr. Brown, who was there, and he also had a notion that there might be juveniles, minors working there. And then there was a possibility that the crime involved Contributing to the Delinquency of a Minor, and all he did, according to his testimony, was ask the young lady for identification. . . . I don't consider that so much a search as an effort to obtain her identification, her age; and that's what he was trying to find . . . Well, you can call it a consent search, but I don't know that he was searching for anything other than the identification. He was trying to ascertain her identification, *which he had a right to do* . . . I don't think he was looking for drugs, and all the business of the other officers being there, I don't know what they were there for. But you are right, they were probably there to search for other customers in there." (T. 44-45, emphasis added)

VI. ARGUMENT

A writ of certiorari should be granted because the appended decision of the Supreme Court of Virginia decided a federal question of substance in a way not in accord with the applicable decisions of this Court.

The sole evidence of Hairston's guilt was the four phenobarbital tablets in the change section of her wallet found by Mr. Cruser. If these tablets were found by the policeman as a result of an illegal search of her wallet when looking for her identification, the tablets are not admissible evidence. *Map v. Ohio,* 367 U. S 463 (1951); and Hairston is entitled to an acquittal or at least a reversal of the judgment of conviction with a remand for a new trial based on other evidence.

The trial judge held that the looking through the wallet of Hairston by Mr. Cruser was not an effort to make a search but an effort to obtain her identification; and accordingly there was no issue of illegal search or seizure involved (T. 44). However, the uncontradicted evidence is the tablets of phenobarbital were not in open view (T. 20) and could not be seen by Mr. Cruser until he opened the coin change section of Hairston's wallet while looking for her identification (T. 4). The wallet could not be seen until the contents of Hairston's pocketbook were poured onto a couch (T. 4). Even though Mr. Cruser may have been looking for identification as opposed to drugs, it is too obvious for judicial pronouncement that the scrutiny of the wallet was a "search" and the taking of the phenobarbital tablets was a "seizure". See *Hale v. Henkel,* 201 U. S. 43 (1906) (dealing with the completely different subject to whether a subpoena from a grand jury violated a person's Fourth Amendment rights but containing dictum that a search ordinarily implies a quest by an officer of the law and a seizure contemplates a forcible disposition of property). Because Mr. Cruser did not necessarily know the tablets were contraband until after a chemical analysis showing them to contain phenobarbital, there is a question as to his seizure of the tablets after finding them; but the argument hereby made is limited to the legality of the search whereby he discovered the tablets.

While Article 1, § 10 of the Constitution of Virginia only prohibits general warrants, by statute it is provided:

> "No officer of the law or any other person shall search any house, place, vehicle, *baggage or thing* except by virtue of and under a warrant issued by a proper officer. Any officer or other person search-

ing any house, place, vehicle, baggage or other thing otherwise than by virtue of and under a search warrant, shall be guilty of a misdemeanor. Va. Code § 19.1-88 (emphasis added).

The statutes provides for no exception. However, in *Chevrolet Truck v. Commonwealth,* 208 Va. 506 (1968), the Supreme Court of Virginia held the statute must be interpreted to permit a police officer to make a search without a warrant under exceptional circumstances; these exceptions generally parallel exceptions to search warrants made by the United States courts in construing the Fourth Amendment which does not bar all searches without warrants but only in unreasonable searches.

Generally a search without a warrant is unreasonable and can only be justified when the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. *Coolidge v. New Hampshire,* 403 U. S. 443 (1971); and *Vale v. Louisiana,* 399 U. S. 30 (1970). While there is no precise formula for determination of the reasonableness of a search and each exception to the warrant requirement must be determined on its own facts and circumstances, *Camera v. Municipal Court,* 387 U. S. 523 (1967), the burden is on the prosecution to prove the exceptional circumstances justify a warrantless search, *United States v. Jeffers,* 342 U. S. 48 (1951).

According to the testimony of Hairston, she was told she was under arrest and her pocketbook was seized without her consent. A search is reasonable when it is incident to a lawful arrest. *United States v. Rabinowitz,* 339 U. S. 56 (1950). A search incident to an unlawful arrest is illegal and the evidence seized is inadmissible. *Henry v. United States,* 361 U. S. 98 (1959); and *Bryson v. Commonwealth,* 211 Va. 85, 88 (1970). Because the record discloses no justification for the arrest prior to searching Hairston's pocketbook and further discloses that there was in reality no arrest made of Hairston on June 6, 1974, the search can not be justified as incident to an arrest.

The trial judge attempted to justify the search as a lawful right of a policeman to detain a citizen briefly for the purpose of demanding identification. However in *Terry v. Ohio,* 392 U. S. 1 (1968), the Court held that when ever a policeman accosts an individual and restrains his freedom to walk away, he has "seized" the person, and a subsequent exploration of objects on the body of such person is a "search". This decision approved the "stop and frisk" doctrine as a reasonable search without a warrant but limited the factual situation to where: (1) the police officer observed the accused engaged in suspicious conduct and had some basis for confronting the accused in the first place; (2) he had reason to think the accused or his companion may be armed and thus a danger to the policeman or others; and (3) the ensuing frisk *must* be to check for weapons and *not* to find evidence of crimes other than possession of weapons. Clearly a search for identification does not fall within the approved catagory of reasonable searches without a warrant.

When a warrantless search is with the consent of the accused, then the search is lawful. However, the trial court refused to label the examination of Hairston's pocketbook as a "consent search". Nevertheless, the appended decision of the Supreme Court of Virginia justifies the search as being with Hairston's consent. The last paragraph of the decision holds that:

> "Frustrated in her own efforts to find identification, the defendant emptied the contents of her purse, including her wallet, and told the officer to look for himself. This was an unequivocal display of a free and voluntary consent to search the contents, including the wallet in which the incriminating drugs were found."

The decision ignores that Hairston was told she had to produce the identification and her acquiescence to the search of her wallet was based on the insistence of the policeman that she produce the identification. It further ignores that the trial court did not find factually that Hairston consented to the search.

Bumper v. North Carolina, 391 U. S. 543 (1968) deals with this issue. There, a rifle incriminating Bumper was found by the search of the house of his grandmother with whom he lived. The grandmother testified as follows:

> "Four of them came. I was busy about my work, and they walked into the house and one of them walked up and said, 'I have a search warrant to search your house' and I walked out and told them to come on in . . . He just came on in and said he had a warrant to search the house, and he didn't read it to me or nothing. So, I just told him to come on in and go ahead and search, and I went about my work." 391 U. S. at pages 546 and 547.

No search warrant was shown by the evidence and the prosecutor relied on a search by consent. The Court held:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and

> voluntarily given. This burden can not be discharged by showing no more than the acquiescence to a claim of lawful authority." 391 U. S. at pages 548 and 549.

The Court further held when the search is unlawful at its inception, it is not validated by what is discovered. Accordingly it is immaterial in the case at bar that Mr. Cruser was looking for an identification and found a controlled substance. It is material that Mr. Cruser told Hairston he "needed some sort of positive identification." (T. 17; last answer), giving her the understanding she had no right to refuse to show him the identification cards in her wallet. Her acquiescence to his demand was not a consent. It is also material that, according to the uncontradicted testimony, Hairston was previously told she was under arrest and, of course, had to submit to the officers' demand for her identification.

Here the consent testified to by Mr. Cruser but denied by Hairston was given during an illegal raid of a massage parlor by numerous policemen. Virginia presented no evidence that the massage parlor was an immoral place or that it would be illegal for a juvenile to be there, but apparently wishes the Court to assume such immorality. Even if it can be assumed, the police officers had ample time and opportunity to obtain a search warrant to look for juveniles within the massage parlor. Yet they elected not to obtain a search warrant and make their search or raid when executing an arrest warrant on Mr. Brown, the proprietor, for a past misdemeanor. Even discounting Hairston's testimony that the police searched every room and even the bathroom, Mr. Cruser himself testified confirming the illegal raid. He was the last person in the building. When he entered the front room, Mr. Brown was already under arrest and

other police officers were talking to Hairston. He immediately ran past the front room into the private area allegedly looking for a fellow policeman. Finding no one else in the building, he returned to the front room where other policemen were talking to Hairston. If there was some crime being committed because Hairston was a juvenile, it would seem more appropriate for one of the youth officers in the group to inquire of Hairston. If additional policemen were needed to make the arrest of Mr. Brown, it would seem more appropriate to use uniformed officers whose identify would be known and thereby decrease the chance of violence. Obviously Mr. Cruser was engaged in the misdemeanor of an illegal search in violation of Va. Code § 19.1-88; and the presence of Mr. Cruser and the other policemen acting in such a fashion had the obvious effect of requiring Hairston to submit to their apparent authority to see her identification.

Even if the implications from the illegal raid are ignored, Mr. Cruser testified that another police officer was seeking Hairston's identification when he approached her, but Hairston had been unable to produce it. Then Mr. Cruser insisted he had to have her identification but he did not tell her his purpose was to determine her age. Her age was mentioned only as an incidental element of the identification. Because Hairston was twenty-five years of age and not a juvenile, it would not have been obvious to a by-stander that Mr. Cruser was asking Hairston for identification for the purpose of determining if she were a juvenile and it would not have been obvious to a by-stander that Hairston would have had a right to refuse to show her identification cards. The pouring of the contents of her pocketbook onto the couch

and asking the policeman to look was not a free and voluntary consent for him to search her wallet but was a submission to his continued demand for the identification which she was unable to find. This flagrant violation of the law by Mr. Cruser and his shifty testimony concerning such violation should not be rewarded by the admissibility of the evidence found as a result of this illegal search.

Formerly evidence obtained as the result of an illegal search and seizure was admissible under Virginia criminal procedure. *Casey v. Commonwealth,* 138 Va. 714 (1924). Consequently a search warrant was treated as a *joke* at least in Roanoke, Virginia. A policeman could search without a warrant without fear of prosecution. He could also lock the suspect in jail without a charge until he obtained a confession. The exclusionary rule dealing with illegal search and seizure was imposed on Virginia criminal procedure by decision of this Court in *Map v. Ohio, supra.* However, in the former times, at least lip service was given to illegal searches; and on occasion, a policeman might be sued. Under the appended decision of the Supreme Court of Virginia, a flagrant raid is held to be legal. By extension of the rationale of the appended decision, any search may be deemed with consent or any confession may be deemed voluntary as long as there is acquiescence by the accused notwithstanding prior coercion by a policeman to obtain the consent. Obviously the decision is erroneous; and to protect further abuse of federally guaranteed rights, a writ of certiorari should be granted to that judgment of the Supreme Court of Virginia.

VII. CONCLUSION

The Supreme Court of Virginia clearly decided the federal question of the search and seizure of a wallet contrary to the decisions of this Court and that decision should be reviewed.

Respectfully submitted,
LILLIE BELLE HAIRSTON
By: John H. Kennett, Jr.,
her counsel

John H. Kennett, Jr.
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Roanoke, Virginia
Counsel for Petitioner

VIII. PROOF OF SERVICE

I, John H. Kennett, Jr., counsel for the Petitioner and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 27th day of February, 1976, I served a true copy of the foregoing petition for a writ of certiorari on the Respondent, Commonwealth of Virginia, by mailing three copies of same in a duly addressed envelope by first class mail with postage thereon prepaid addressed to Andrew P. Miller, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia.

JOHN H. KENNETT, JR.
Counsel for the Petitioner

IX: APPENDIX

This appendix consists of a decision of the Supreme Court of Virginia on December 1, 1975.

APPENDIX

IN THE SUPREME COURT OF VIRGINIA ON THE 1ST DAY OF DECEMBER, 1975

LILLIE BELLE HAIRSTON,

Plaintiff in error

against

COMMONWEALTH OF VIRGINIA,

Defendant in error

RECORD NO. 750182

Present: I'Anson, C. J., and Carrico, Harrison, Cochran, Poff, and Compton, JJ.

From the Circuit Court of the City of Roanoke,
Robert J. Rogers, Judge presiding

PER CURIAM

The defendant, Lillie Belle Hairston, was convicted by the trial court, sitting without a jury, of unlawful possession of a controlled substance without a prescription. She was sentenced to pay a fine of $150.00 and to serve a term of 30 days in jail, which term was suspended on condition of good behavior. The sole question on appeal is whether the drugs found in the defendant's possession were seized as the result of an illegal search of her wallet.

The record shows that on June 6, 1974, Detective F. S. Cruser, Jr., and several other officers of the Roanoke Police Department entered Miss Rene's Massage Parlor to execute a warrant for the arrest of the manager,

L. R. Brown, Jr. The officers also intended to investigate a report that juveniles were employed in the establishment.

According to the Commonwealth's evidence, after Brown was placed under arrest, Detective Cruser asked the defendant, who was in the front office for "some sort of identification to ascertain her age." The defendant began "looking through her pocketbook" and, becoming "rather perturbed," opened the purse and "dumped . . . out" its contents on a sofa. She then said to Cruser, "I can't find [any identification], you look for it." Cruser looked "through the contents," found a wallet, examined it, and discovered four tablets in one of its compartments. A temporary driver's license also found in the wallet showed that the defendant was 25 years old.

The defendant, testifying in her old behalf, stated that she was not 25 but 30 years old. She said that, after Brown was arrested, three police officers "cornered" her and told her she was "under arrest too," although it was later admitted that "they didn't arrest her." The defendant testified that Detective Cruser took her purse, "just dumped it out," and "went through" it. She claimed that she "had $100 in [her] purse, but it was missing" after the incident.

The four tablets found in the defendant's wallet were subsequently analyzed as phenobarbital, a controlled substance. Later, approximately four weeks after the incident at the massage parlor, the defendant was arrested and charged with possession of the drugs.

We will assume, without deciding, that Detective Cruser's examination of the defendant's wallet constitut-

ed a search. The crucial question then becomes whether the search was unreasonable.

A search conducted with the free and voluntary consent of the accused is not an unreasonable search. *See Rees v. Commonwealth,* 203 Va. 850, 866, 127 S. E. 2d 406, 417 (1962), *cert. denied,* 372 U. S. 964 (1963). The burden, of course, is upon the Commonwealth to show that consent is freely and voluntarily given. *Bumper v. North Carolina,* 391 U. S. 543, 548 (1968). Whether consent is voluntary is a question of fact to be determined from all the circumstances. *Schneckloth v. Bustamonte,* 412 U. S. 218, 227 (1973).

The defendant contends that her consent to search was not free and voluntary "but was a submission to [Detective Cruser's] continued demand for the identification which she was unable to find." We are of opinion, however, that the Commonwealth fully carried its burden of proving that the defendant freely and voluntarily consented to the search which led to discovery of the incriminating drugs.

According to the Commonwealth's evidence, which the trial court accepted over the defendant's obviously untrustworthy version, the defendant was merely asked by Detective Cruser to produce identification indicating her age, the officer being uncertain whether she was "18 years of age or under." Frustrated in her own efforts to find identification, the defendant emptied the contents of her purse, including her wallet, and told the officer to look for himself. This was an unequivocal display of a free and voluntary consent to search the contents, including the wallet in which the incriminating drugs were found.

Accordingly, the judgment of conviction will be affirmed.

Affirmed.